

## Forest Service, USDA

## §217.19

for litigation, whether the decision is precedential in nature, or whether the decision modifies existing or establishes new policy.

(b) As provided for a §§217.7 (c) and (d), 217.10(h), and 217.11, certain dismissal decisions rendered by Forest Service line officers, and appeal decisions rendered by Regional Foresters and the Chief (§217.16) are subject to discretionary review at the next highest administrative level. Within one day following the date of any decision subject to such discretionary review, the Reviewing Officer shall forward a copy of the decision and the decision documents (§217.2) upon which the appeal was predicated to the next higher officer.

(c) When a stay of implementation is in effect, it shall remain in effect until the end of the 15-day period in which a higher level officer must decide whether or not to review a Reviewing Officer's decision (§217.17(d)). If the higher level officer decides to review the Reviewing Officer's decision, the stay will remain in effect until a decision is issued (§217.17(f)), or until the end of the 30-day review period provided in §217.17(g) whichever is less.

(d) The higher level officer shall have 15 days from date of receipt to decide whether or not to review a lower level appeal decision, and may request and use the appeal record in deciding whether or not to review the decision, including decisions to dismiss. If the record is requested, the 15-day period is suspended at that point. The lower level Reviewing Officer shall forward it within 5 days of the request. Upon receipt, the higher level officer shall have 15 days to decide whether or not to review the lower level decision. If that officer takes no action by the expiration of the 15-day period or the additional 15-day period following receipt of the record, the decision of the Reviewing Officer stands as the final administrative decision of the Department of Agriculture. All participants shall be notified by the discretionary level whether or not the decision will be reviewed.

(e) Where an official exercises the discretion in §217.7 (d) or (e) of this

subpart to review a dismissal or appeal decision, the discretionary review shall be made on the existing appeal record and the lower level Reviewing Officer's appeal decision. The record shall not be reopened to accept additional submissions from any source including the Reviewing Officer whose appeal decision is being reviewed.

(f) The discretionary level Reviewing Officer shall conclude the review within 30 days of the date of the notice issued to participants that the lower decision will be reviewed, and shall send a copy of the review decision to all participants.

(g) If a discretionary review decision is not issued by the end of the 30-day review period, appellants and intervenors shall be deemed to have exhausted their administrative remedies for purposes of judicial review. In such case, the participants shall be notified by the discretionary level.

[54 FR 3357, Jan. 23, 1989; 54 FR 13807, Apr. 5, 1989, as amended at 54 FR 34510, Aug. 21, 1989; 55 FR 7896, Mar. 6, 1990; 58 FR 58916, Nov. 4, 1993]

### §217.18 Policy in event of judicial proceedings.

It is the position of the Department of Agriculture that any filing for Federal judicial review of a decision subject to review under this part is premature and inappropriate unless the plaintiff has first sought to invoke and exhaust the procedures available under this part. This position may be waived upon a written finding by the Chief.

### §217.19 Applicability and effective date.

(a) The appeal procedures established in this part apply to all appealable decision documents published on or after February 6, 1991.

(b) Notices of appeal filed under 36 CFR 211.16, 36 CFR 211.18, 36 CFR 228.14, and 36 CFR 292.15 prior to February 22, 1989 remain subject to those procedures.

[54 FR 3357, Jan. 23, 1989, as amended at 56 FR 46550, Sept. 13, 1991]